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IN THE

Supreme Court of the United States

No. [redacted] 225

TOM JOE ARRUDA,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

EDWIN R. SCHNEIDER, JR.
LEMUEL R. GREEN
SHARLITT, SCHNEIDER & KRUCOFF
1129 Twentieth Street, N.W.
Suite 511
Washington, D.C. 20005

MILTON STERN, JR.
1225 Post Street
Suite 946
San Francisco, California 94109

Counsel for Petitioner

Washington, D. C. THIEL PRESS 202 393-0825

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit entered in this case on April 21, 1970.

OPINIONS BELOW

The Finding and Order of the District Court for the Northern District of California, which is unreported, is printed in Appendix A to this Petition. The decision of the Court of Appeals was rendered Per Curiam (Merrill, Wright and Trask, Circuit Judges) without opinion, stating only, "The above entitled cause having been argued and submitted, it is ordered that the judgment be and it is hereby affirmed.".

JURISDICTION.

The judgment of the Court of Appeals was entered on April 21, 1970. On May 19, 1970, Mr. Justice Douglas extended the time for filing a petition for a writ of certiorari to and including June 20, 1970. The jurisdiction of this Court is invoked under 28 U.S.C., § 1254(1).

QUESTIONS PRESENTED

1. When the petitioner was convicted of theft from the mail, did the District Court exceed the permissible limits of its discretion or deny the petitioner due process of law by sentencing him to one year in jail solely because he had apparently refused to report to his local Selective Service Board?

2. Whether the District Court denied potitioner his constitutional right to the equal protection of the laws when it sentenced him to jail while indicating that he could go free if he could enter the Army, when it was apparent from the record that petitioner was physically unfit for military service.

CONSTITUTIONAL PROVISIONS AND STATUTE INVOLVED

"No person shall . . . be deprived of life, liberty, or property, without due process of law . . . ." Constitution of the United States, Amendment V.

"Whoever, being a postmaster or Postal Service employee, embezzles any letter, postal card, package, bag, or mail or any article or thing contained therein intrusted to him or which comes into his possession intended to be conveyed by mail, or carried or delivered by any carrier, messenger, agent, or other person employed in any department of the Postal Service, or forwarded through or delivered from any post office or station thereof established

by authority of the Postmaster General; or steals, abstracts, or removes from any such letter, package, bag, or mail, any article or thing contained therein, shall be fined not more than $2,000 or imprisoned not more than five years, or both." June 25, 1948, c. 645, 62 Stat. 780, 18 U.S.C., § 1709.

STATEMENT OF THE CASE

Petitioner, Tom Joe Arruda, was indicted for theft of mail, in violation of 18 U.S.C., § 1709. After waiver of jury trial, the court heard the government's evidence and petitioner's testimony on his own behalf. The court then heard the petitioner's argument concerning a finding of guilt to a lesser included offense and reserved decision on this question until the date set for sentencing. On that date, the court rejected petitioner's contention concerning the lesser included offense. (Tr. 2-3, Appendix A)

At the sentencing proceeding which followed, the District Judge had a presentence report before him. Counsel urged leniency on the ground that petitioner's record was untarnished by any legal violations. The defendant declined to make any statement on his own behalf. The court then stated:

> "THE COURT: This has bothered me considerably, because there is no prior record of any sort. On the other hand, there is a definite record of eleven refusals to submit for induction or for refusal to submit to notices from the military authorities to appear for induction." (Tr. 5)

Petitioner's counsel objected to consideration of induction matters at sentencing, as he had been prevented from eliciting testimony from the petitioner on this subject during trial. (Tr. 5) The court then indicated that its comments were based upon a factual report from the Probation Officer, who was present in court. At the court's request, the Probation Officer stated that, "there were eleven refusals on the part of the defendant to report for

various reasons to the Selective Service Board." Counsel then stated that the petitioner did not agree, and petitioner stated that he had been under a doctor's care for years, that he had failed two physicals, and that he had been sick when called for further physicals. (Tr. 6-7) The court indicated that although the presentence report showed a history of illness and treatment, it saw no excuse for failure to appear and state reasons, and that, "Boys have gone many, many times to many, many summonses, and it is not for you to take that matter in your hands." (Tr. 7-8) The Court then made the following crucial statement:

> "Now, I am afraid the situation now—*if I felt that you could go into the Army, I would be inclined to just hold up judgment here until you went down and were submitted and were taken into the Army.* But they tell me—the advice I get is that under the circumstances you would not be inducted at all. So I am faced with a situation where it looks to me almost as if you have been committing these acts in order to keep out of the draft. That is one of the strong suspicions that the Court has." (Tr. 8) (Emphasis supplied)

The petitioner was then sentenced to jail for one year. (Tr. 8-9)

On appeal, the Court of Appeals for the Ninth Circuit affirmed without opinion.

REASONS FOR GRANTING THE WRIT

A. There Is a Conflict Among Courts of Appeals on This Question.

The decisions of the Court of Appeals for the Ninth Circuit concerning the limits of the discretion of a District Judge in sentencing are in conflict with decisions in other Circuit Courts of Appeals. Although the judgment in this case was rendered without opinion, it is clearly based upon previous decisions in the Ninth Circuit.

The basic law in the Ninth Circuit concerning review of the trial court's discretion in sentencing is concisely set forth in *Bowman v. United States*, 350 F.2d 913, 917 (9th Cir., 1965): "In any event, this court has repeatedly held that it has no authority to review the sentence so long as it falls within the statutory limits." It appears that the rigidity of this rule has been relaxed only in an extraordinary situation in which a trial court considered in the course of sentencing evidence which had been judicially determined to have been illegally seized. *Verdugo v. United States*, 402 F.2d 599 (9th Cir., 1968). See also, *Austin v. United States*, 408 F.2d 808 (9th Cir., 1969); *King v. United States*, 410 F.2d 1127 (9th Cir., 1969).

The conflict among Courts of Appeals is well illustrated by a recent decision of the Court of Appeals for the Fourth Circuit, *United States v. Eberhardt*, 417 F.2d 1009 (4th Cir., 1969). The case concerned prosecution of four persons who had protested United States involvement in Viet Nam. They were convicted of injury to government property, mutilation of public records and interference with administration of the Selective Service System. Subsequent to trial, but before sentencing, two of the defendants participated in further illegal conduct—burning draft records. The court recognized that the trial judge was aware of this latter incident when he passed sentence, and that he was not obliged to ignore the event. Nevertheless, the court held ". . . that he could sentence only for the offense for which the defendants had been convicted, *for if he undertook to penalize them for the other offense as well*, it would run afoul of due process if not double jeopardy." (417 F.2d at 1015, emphasis supplied). Speaking for the Court of Appeals in that case, Judge Sobeloff observed "Precisely what passed through the judge's mind is purely speculative and we have no reason to think that the judge undertook to impose a penalty for the second offense." (*Id.*). Nevertheless, the case was remanded for further consideration of the sentences in light of the appellate court's statement of the law.

This speculation concerning the trial court's reasoning contrasts sharply with the facts of the instant case, in which it is *clear* that petitioner was being sentenced for the unrelated offense.[1] The conclusion is inescapable that the trial court in petitioner's case would have been reversed if the appeal had been made to the Court of Appeals for the Fourth Circuit. The conflict between the circuits is manifest.

Other Courts of Appeals have also rejected the excessively restrictive view held in the Ninth Circuit concerning appellate review of sentencing by a trial court. Thus, in *Marano v. United States*, 374 F.2d 583, 586 (1st Cir., 1967), the court held that where it was evident that the District Court had given substantial consideration to legally impermissible factors, correction must be possible. The Court of Appeals for the District of Columbia, in an exhaustive study of this subject, has recently concluded that the appellate court must scrutinize the sentencing process to insure that the trial judge has considered the information available with proper regard for its reliability and that it has evaluated the information in light of the factors relevant to sentencing. *Scott v. United States*, 419 F.2d 264 (D.C. Cir., 1969).

B. The Judgment of the Court of Appeals for the Ninth Circuit Conflicts with Decisions of the Supreme Court.

In *Townsend v. Burke*, 334 U.S. 736 (1948), this court held that absence of counsel at sentencing constituted a denial of due process, as it was vital that counsel be present to correct the trial court's mistaken assumptions concerning the defendant's criminal record. In *Williams v. New York*, 337 U.S. 241 (1949), this court held that a trial court could rely in sentencing upon information concerning

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[1] It is not, of course, even established in this record that any offense was committed.

background and character of a defendant, (1) when the accuracy of the statements made by the judge was not challenged by defendant or his counsel, and (2) when the judge was not asked to afford the defendant a chance to refute or discredit these statements by cross-examination or otherwise (337 U.S. at 244).

The procedure followed by the trial court in this case conflicts with both the *Townsend* and *Williams* decisions.

Townsend found a denial of due process because counsel was not present to correct the court's mistaken assumptions. Petitioner was represented by counsel, but counsel's efforts to have the Selective Service problems considered by evidence from the petitioner were thwarted when the trial court refused to hear such evidence when it was offered. This is equivalent to the denial of counsel proscribed by *Townsend*.

Similarly, *Williams* permitted reliance upon general information concerning background and character only when the accuracy of this information was not challenged and in the absence of a request for an opportunity to refute or discredit damaging statements. In the instant case, petitioner and his counsel challenged these statements, urging that petitioner had been too sick to report to Selective Service. Without any evidence, and relying solely upon the unsworn word of the Probation Officer and the court's *suspicions*, the court refused to believe him, and proceeded to sentence him for his Selective Service problems. This procedure contrasts sharply with the thoughtful protection of due process required in *Baker v. United States*, 388 F.2d 931 (4th Cir., 1968), in which the court held that a defendant should be given an opportunity to refute or explain any record disparagement of his earlier deportment, and required that no conviction or criminal charge should be included in the report, or considered by the court, unless referrable to an official record.

The due process guaranteed by *Townsend* and *Williams* if a trial court is permitted to base a sentence upon its sus-

picious and unverified assumptions concerning a defendant's motives regarding problems with his draft board.

C. The District Court's Clear Denial of the Equal Protection of the Laws Requires Exercise of This Court's Power of Supervision.

The record of this case shows an invidious discrimination against the physically unfit. Had petitioner been able to go into the army, the trial judge would have held up his judgment and permitted him to go free on the condition that he was taken into the army. However, the record also shows that petitioner had failed to pass two physical examinations. He could not enter the army, so he was sentenced to a year in jail.

The healthy are set free to enter the army. The halt and the lame go to jail. This discrimination is so shocking that this court should exercise its powers of supervision to remand the case for resentencing.

The due process clause of the Fifth Amendment to the Constitution is sufficiently broad in scope to forbid unjustifiable discrimination and denial of equal protection. *Shapiro v. Thompson*, 394 U.S. 618, 641-642 (1969), *Bolling v. Sharpe*, 347 U.S. 497 (1954).

CONCLUSION

For the foregoing reasons, this Petition For A Writ Of Certiorari should be granted.

Respectfully submitted,

EDWIN R. SCHNEIDER, JR.
LEMUEL R. GREEN
Sharlitt, Schneider & Krucoff
1129 Twentieth Street, N.W.
Suite 511
Washington, D.C. 20036

MILTON STERN, JR.
1225 Post Street
Suite 946
San Francisco, California 94109

Attorneys for Petitioner

APPENDIX A

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

[Filed: Jul. 28, 1969]

UNITED STATES OF AMERICA,
Plaintiff,

v.

CRIMINAL NO. 42703
FINDING AND ORDER

TOM JOE ARRUDA,
Defendant.

The above case was tried without a jury on July 3, 1969. The decision of the Court, finding defendant Tom Joe Arruda guilty as charged in the indictment was announced on July 18, 1969. This general finding and Order is filed pursuant to Rule 23(c) of the Federal Rules of Criminal Procedure.

Defendant was charged in a one-count indictment with the embezzlement of a certain parcel post package from the mail, while he was employed by the United States Post Office Department, in violation of Title 18 United States Code, Section 1709. The evidence established beyond a reasonable doubt that the defendant was employed as a Career Regular Clerk of the United States Post Office Department on January 25, 1969, and that he embezzled a parcel post package addressed to one Thomas McDonnell from mail which was entrusted in defendant and which came into defendant's possession intended to be conveyed by mail. During the course of the trial, defendant judicially admitted his commission of all of the elements of the crime charged.

At the conclusion of all of the evidence, defendant requested the return of a verdict of not guilty of the offense charged, but rather a finding of guilt of a lesser

included offense. Defendant submitted excerpts from Sections 1701 and 1073(b) of Title 18 United States Code, and requested a finding that defendant was guilty of either the offense of obstruction of the mails, or the offense of delay or destruction of mail or newspapers. If is to be noted that Section 1709 of Title 18 United States Code is a felony provision in which the value of the object taken is immaterial, in contrast, among others, to Sections 641, 656 and 659 of the same Title. Assuming, for the purposes of this case only, that Sections 1701 or 1703(b) of Title 18 United States Code are possible lesser included offenses which are embraced within a charge of embezzlement of mail under 18 United States Code, Section 1709, the Court is satisfied, upon careful consideration of all of the evidence, that all of the elements of the crime of embezzlement of mail matter were established beyond a reasonable doubt and, therefore, a finding that defendant was only guilty of a lesser included offense would be inappropriate. In accordance with the previously announced decision of the Court, IT IS HEREBY ORDERED that the defendant is found to be guilty as charged in the indictment, and judgment and sentence is to be entered as pronounced by the Court on July 18, 1969.

DATED: July 25, 1969 /s/ Caleb R. Layton III
United States District Judge

In the Supreme Court of the United States

OCTOBER TERM, 1970

No. 225

TOM JOE ARRUDA, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

After a non-jury trial in the United States District Court for the Northern District of California, petitioner was convicted on a one-count indictment which charged that, as a postal clerk, he embezzled a postal package in violation of 18 U.S.C. 1709. On July 18, 1969, he was sentenced to one year's imprisonment. The court of appeals affirmed.

1. The evidence as to petitioner's guilt of the offense charged is not in dispute. The district court found that during the course of the trial, petitioner

admitted his commission of all of the elements of the offense (Pet. App. 10). Petitioner's objections go rather to his sentence.

The record shows that before passing sentence, the court had offered the defense an opportunity to read the presentence report (2 R. 4),[1] but defense counsel declined this offer. The court then pointed out that the report contained information that petitioner had on eleven occasions refused to comply with orders of his Selective Service board either to report for physical examinations or to report for induction (2 R. 5-6). Petitioner replied that on each occasion he had "happened to be sick," that two earlier medical examinations had resulted in his rejection, and that he had not sought to evade the draft (2 R. 7-8).

A probation officer, present in court, corroborated the report of the eleven refusals (2 R. 6). The court noted that petitioner's doctor, in a letter to the court, had written that there existed no medical reason for petitioner's non-compliance with the orders to take the medical examinations. The court pointed out that during the years covered by the refusals, petitioner had been able to work at his Post Office job. The court added that if he felt that petitioner might still be inducted, he would be inclined to hold in abeyance pronouncement of judgment, but that he was presently informed that "under the circumstances [peti-

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[1] "R." preceded by the volume number refers to the three-volume record presently on file with the Clerk of this Court. The transcript pertaining to the sentence is contained in volume 2.

tioner] would not be inducted at all" (Pet. 4). Petitioner's sentencing followed (2 R. 7-8).

2. The basic assumptions underlying petitioner's arguments regarding the sentence imposed—that he was not afforded an opportunity to rebut the information in the presentence report and that he was being punished for his alleged Selective Service derelictions, and not for the crime on which he was convicted—are unfounded.

Petitioner was afforded an ample opportunity to refute or explain his failure to comply with his duties as a Selective Service registrant, but failed to do so. In these circumstances, it was entirely proper to consider the information contained in the presentence report in deciding on the sentence to be given, even though it involved a matter unrelated in any direct fashion to the crime upon which sentence was imposed.[2] *Williams* v. *New York*, 337 U. S. 241; *Cross* v. *United States*, 354 F. 2d 512, 514-515 (C.A.D.C.); *United States* v. *Doyle*, 348 F. 2d 715, 721 (C.A. 2), certiorari denied, 382 U. S. 843; *United States* v. *Trigg*, 392 F. 2d 860 (C.A. 7), certiorari denied, 391 U. S. 961; *United States* v. *Onesti*, 411 F. 2d 783 (C.A. 7), certiorari denied, 396 U. S. 904.

The fact that the court stated that he would have been "inclined to just hold up judgment" if petitioner had been acceptable for military service (see Pet. 4),

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[2] There was no error in the court's refusal (see Pet. 5) to hear evidence at trial on the question of petitioner's guilt or innocence of the Selective Service violations, since that information was irrelevant to the embezzlement charge on which he was convicted.

hardly supports the claim that petitioner was denied equal protection by being sentenced to a term of imprisonment (Pet. 8). The court was merely expressing its views as to how it would have proceeded had a certain alternative been available, which it believed was in fact not open. There was no promise, express or implied, in the court's announcement of its views which required it to impose probation or impose some other obligation comparable to military service instead of a prison sentence well within the statutory maximum.[3]

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ERWIN N. GRISWOLD,
Solicitor General.

JULY 1970.

[3] Petitioner was sentenced to one year's imprisonment; a five-year maximum is authorized by 18 U.S.C. 1709, for violation thereof.

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